84045-8

No. 61804-1-I
King County Superior Court No. 07-1-04039-7 SEA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Plaintiff/Appellee,
v.

SIONE P. LUI,
Defendant/Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 FEB 27 AM 11:07

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael J. Trickey, Judge

CORRECTED APPELLANT'S OPENING BRIEF

David B. Zuckerman
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-1595

* See App's Brief filed on 2-2-09 *

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

I.
ASSIGNMENTS OF ERROR

1) The trial court violated Lui's Sixth Amendment right to confront witnesses when it admitted the testimony of medical examiner Richard Harruff regarding the victim's injuries and the time and cause of death. Dr. Harruff did not perform the autopsy, and he related and relied on the reports and notes of others who were not available for cross-examination.

2) The trial court violated Lui's Sixth Amendment right to confront witnesses when it admitted the testimony of DNA expert Gina Pineda. Ms. Pineda did not perform or witness any of the testing to which she testified, and the scientists who actually performed the work and prepared the reports were not available for cross-examination.

II.
ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Is the Confrontation Clause violated when an expert witness's testimony is based on the work of others who do not testify, and that work was done for the purpose of the criminal prosecution?

III.
STATEMENT OF THE CASE

On February 9, 2001, Elaina Boussiacos was found dead in the trunk of her car, which was parked in the lot of the Woodinville Athletic Club (WAC). Her fiance at the time was Sione Lui. Six years later, Lui was charged with murder. The evidence against Lui was entirely circumstantial. There was no eyewitness to the crime, no confession, and no history of domestic violence between Lui and Boussiacos. The vast majority of the evidence presented at trial was available in 2001.

Lui and Boussiacos met in 1999. V RP 425. By the end of 2000 they were living together at an apartment in Woodinville. V RP 414. Their relationship was somewhat volatile and both were jealous. V RP 403-04. But at times they were very happy with each other and spoke of getting married. VI RP 695-96 (testimony of Boussiacos's mother). The status of their engagement frequently changed. Boussiacos would alternately wear or remove her engagement ring, depending on how she was feeling about Lui at the moment. IV RP 371.

In late January, 2001, Boussiacos learned that Lui had been talking with a woman named Sina Packer. Packer and Lui had a sexual relationship in the past but were now just friends. V RP 504-05, 508-11; VI RP 641; VI RP 1424. Nevertheless, Boussiacos was mad at Lui, in particular because he lied about how often he was in touch with Packer. V

RP 500-01. Boussiacos told Packer that the engagement was off. V RP 502.

On January 28, 2001, Boussiacos bought a ticket to California. VI RP 623. She planned to visit her mother, Maria Phillips. VI RP 697-98. Phillips testified that Boussiacos spoke of ending the engagement, but Phillips advised her not to do anything rash. VI RP 698-99. On Friday, February 2 at 9:30 p.m., Boussiacos dropped off her son from a previous marriage with his father, Anthony Negron. VI RP 651, 660. Boussiacos's flight was scheduled to leave at 8:30 a.m. on Saturday, February 3, 2001, but she was not on the flight. VI RP 623.

On Monday, February 5, Phillips informed Lui that her daughter never arrived. VI RP 703. Lui and his friends then made various efforts to search for Elaina, including putting up missing person flyers around Woodinville. VI RP 725, 733; XVI RP 1742. Sam Taumoefolau testified, in particular, that he and Lui were in the mall next to the WAC copying and putting up flyers on Tuesday, February 6 and Wednesday, February 7. XVI RP 1739-42. They did not see Elaina's car in the club's lot. XVI RP 1775-76. Taumoefolau recalled asking someone at the WAC to put up a flyer. XVI RP 1772. Katherine Wozow, the owner of the WAC, believed that Elaina's car had been sitting in her lot since the morning of February

3. VI RP 742-45. She was not aware of anyone requesting to put up missing person flyers at her club. VI RP 747.

On Friday, February 9, WAC staff contacted the police about the car, and the police confirmed that it belonged to the missing person. VI RP 745. Detectives arrived at the club that evening. VII RP 837; VIII RP 948-49. They found Elaina's body in the trunk of her car. VII RP 951. She was wearing sweatpants and a long-sleeved t-shirt. VII RP 865-66. She had some injuries including bruising in the area of her neck. VII RP 865. Her bra was stuffed up inside of her shirt. VII RP 866-67. It appeared that she had been dressed by someone else. IV RP 344; XVI RP 1726-28; XVI RP 1832. There was a suitcase, gym bag and "travel bag" in the car. VII RP 886, 895.

Nine identifiable fingerprints were found on the car. None of them belonged to Lui. XII RP 1578, 1581.

The detectives found a small blood stain by the stick shift. VII RP 883. It was collected into evidence. VIII RP 1031. The Washington State Patrol Crime Laboratory obtained a DNA profile from the blood. IX RP 1194-95. It did not match Lui or Boussiacos. IX RP 1224-25.

A very small number of Lui's sperm cells were found on Boussiacos's underpants. IX RP 1220-21, 1271. The cells could have

been there for a long time. IX RP 1269-71. Similarly, a very small amount of sperm was found in the vaginal swabs taken from Boussiacos. IX RP 1235-36. Again, the WSP scientist could not say how long they had been present. IX RP 1254.

The steering wheel contained Boussiacos's DNA with a trace of unidentified male DNA. IX RP 1218.

The crime scene team from the Washington State Patrol Laboratory was not called out to examine Boussiaco's car for trace evidence. IX RP 1260. Nobody tested her clothing to see whether the perpetrator left skin cells on it when putting her in the trunk. IX RP 1274. Although it appeared that Boussiacos was strangled, nobody swabbed her neck to see whether the perpetrator left skin cells there. IX RP 1279. *See also*, XVI RP 1727-28.

As discussed in detail below in section IV(B), the victim's shoelaces contained DNA belonging to either Lui or his son, DNA belonging to either James Negron or his son, and DNA belonging to an unidentified male. The DNA testimony also raised the possibility of a weak, unknown male profile in the vaginal wash. The record does not reflect any attempt to determine whether the unidentified profiles found on

the stick shift, the shoelaces, the steering wheel, and the vaginal wash matched each other.

Lui's home was in the total control of the Sheriff's Office for several weeks, beginning on February 9, the day Boussiacos's body was found. XVI RP 1714-15. During that time the police were free to examine and seize any items they wished. XVI RP 1715-16. Lui had no advance notice that he would not be allowed back in the house after February 9. XVI RP 1716. The police found no signs of violence. VIII RP 943-48, 957-58, 1009-11.

Several witnesses testified that Boussiacos was in the habit of dressing nicely and putting on makeup whenever she went out. When Sina Packer met with Boussiacos at a restaurant on January 31, 2001 (RP 494-96), however, her hair was pulled back in a pony tail and she had hardly any makeup on. V RP 503.

On Wednesday, February 14, eleven days after Boussiacos went missing and five days after she was found dead, Detective Denny Gulla arranged for dog tracker Richard Schurman to meet him at the WAC parking lot. VIII RP 959-60. Detective Gulla brought with him an article of male clothing he had found in the Lui household. VIII RP 961. The dog sniffed the clothing and then pursued a track that led through the mall

adjacent to the WAC, and ultimately to Lui's home. VIII RP 1072-77. The State's theory was that Lui killed Boussiacos, put her body in the trunk of her car, drove it to the WAC parking lot, and then walked back to his apartment. XVI RP 1840-41. The defense suggested that the dog was following the more recent path Lui took when he walked through the area with Taumoefolau. VIII RP 1104-06. Schurman could not say when the scent trail was laid down. *Id.* Schurman acknowledged that scent deteriorates over time. VIII RP 1087-89. Bloodhounds are certified based on their ability to follow 24-hour-old trails. VIII RP 1089-90. Regarding an 11-day-old trail, Schurman stated: "I would start to be real cautious about watching my dog's behavior, because they tend to go off trail." VIII RP 1106. The oldest trail he had ever followed was 12 days old. VIII RP 1097.

The testimony of medical examiner Dr. Richard Harruff and DNA expert Gina Pineda is discussed in section IV, below.

The jury convicted Lui of murder in the second degree, as charged. CP 19. He was sentenced within the standard range to 200 months. CP 36-44.

IV.
ARGUMENT

A TESTIMONY OF DR. HARRUFF

The State presented the testimony of medical examiner Dr. Richard Harruff although Dr. Kathy Raven performed the autopsy in this case. X RP 1337. Dr. Harruff "probably did not see the autopsy directly." X RP 1338. He reviewed Dr. Raven's report, however, and "signed off on it." X RP 1339.

Defense counsel objected that the testimony was based on hearsay. X RP 1341. The Court did not believe the objection was well-taken under the hearsay rules because an expert can rely on hearsay under ER 703. X RP 1345-46. The Court recognized, however, that a separate issue was presented under the Confrontation Clause of the Sixth Amendment. X RP 1346. The prosecutor maintained that the Confrontation Clause was not implicated because Dr. Raven's work was "not testimonial." Rather, [t]his is a public health requirement." *Id.* Defense counsel disagreed, noting that the very purpose of an autopsy report in a homicide case is to prepare testimony for trial. X RP 1346-47.

The Court agreed with the defense that "a large purpose of these reports is testimonial." X RP 1347. Nevertheless, "since he signed off on the report at the time the confrontation requirement is satisfied by him being in court." The Court therefore overruled the objection. *Id.*

As Dr. Harruff continued to testify, defense counsel again objected, noting that Dr. Harruff was now relying on and relating information recorded by others besides Dr. Raven, such as the temperature of the victim's body at the time she was found. X RP 1352-54. As the prosecutor recognized, Dr. Harruff could not give his opinion as to the time of death with relying on the body temperature. X RP 1370. The Court again overruled. X RP 1352-54, 1370-71.

Dr. Harruff ultimately testified that the death could have taken place on February 2 or 3, 2001. X RP 1356. He also testified that the victim had various injuries, that she was killed by strangulation, possibly with a ligature, and that she had no alcohol or drugs, including nicotine, in her blood. X RP 1357-98. (The lack of nicotine aided the State because Lui told the police that Boussiacos might have been killed after sneaking out of the house to smoke. X RP 1430; XVI RP 1845.) This testimony was based not only on the autopsy report but also on photographs taken by others, and on a toxicology report performed by others. *See, e.g*, X RP 1375-77 (discussing photographs) and X RP 1397-98 (discussing toxicology report).

The prosecutor relied on Dr. Harruff's testimony in arguing that that Lui intended to kill Boussiacos, a necessary element of murder in the

second degree. XVI RP 1850. She focused on his description of various bruising, which the prosecutor argued was consistent with the victim trying to defend herself. Id. She then repeated Dr. Harruff's opinion regarding the level of force and the amount of time it would have to be applied to strangle Boussiacos to death.

> It could have taken up to four minutes to die. I am not going to count that out. But we know that it was long enough, whatever it was, to burst those tiny blood vessels in her eyes and in her mouth and on her skin. To kill her with nothing other than an intent of, "I am going to kill you."

XVI RP 1850-51. She also relied on Dr. Harruff's testimony to argue that "there wasn't a lot of blood because it is that purging post death, sort of pinky colored." XVI RP 1850. That helped her explain why no bloodstains were found in Lui's home or on his clothing.

B. TESTIMONY OF GINA PINEDA

The State proposed to present a witness, Gina Pineda, to various DNA results obtained by a private laboratory, although she took no part in the testing. X RP 1415-19. Rather, Ms. Pineda merely reviewed the notes and reports of the scientists who performed the tests. X RP 1419. The defense objected that Pineda's testimony would violate the Confrontation Clause. Defense counsel argued that the underlying documents were clearly testimonial because they were generated as part of the criminal

litigation, yet the scientists who performed the work would not be available for cross-examination. X RP 1419-20.

On April 17, 2008, the prosecutors sent an e-mail to the Court arguing that Ms. Pineda's testimony should be admissible if the State satisfied the foundational requirements set out in *State v. Ecklund*, 30 Wn. App. 313, 633 P.2d 933 (1981) and *State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (2002), *review denied*, 148 Wn.2d 1001, 60 P.3d 1212 (2003). The Court responded by e-mail that it agreed with the State. *See* CP 17-18. *See also*, XII RP 1477-80.

Ms. Pineda testified that she is the associate director of Orchid Cell Mart, a private DNA company in Dallas, Texas. XII RP 1483. She previously worked for Reliagene Technologies, a DNA company located in New Orleans, Louisiana that was acquired by Orchid Cell Mart. *Id.* For the last four years, Pineda had done little DNA testing herself. XII RP 1484. She did not view or participate in any of the testing done in this case. XII RP 1489, 1494-95.

Reliagene tested the shoelaces from the victim, the vaginal swab DNA extract, and three known samples from various individuals. Orchid Cell Mart tested the vaginal wash from the victim. XII RP 1491. In regard to the testing at Reliagene, Pineda reviewed the documentation

prepared by the analysts and signed off on the report. XII RP 1505-06. Ms. Pineda was aware of the chain of custody procedures at Reliagene and Orchid Cell Mart, but could not say from her own observations that they were followed in this case. XII RP 1508-13.

The testing performed by Reliagene and Orchid Cell Mart was restricted to the Y chromosome, which is unique to males. The testing would therefore ignore any female DNA in the sample. XII RP 1496-97. This type of testing cannot distinguish between the members of the same paternal lineage (such as a father and his son). XII RP 1502. Neither Sione Lui nor his son, Enoch Lui, could be excluded as the "major" donors of DNA found on the victim's shoe laces. XII RP 1518. The profile detected occurs in about 0.2% to 0.3% of the male population. XII RP 1545. Anthony Negron, the ex-husband of Elaina Boussiacos, could not be excluded as a "minor" donor of DNA on the shoelaces. XII RP 1519. In addition, an unidentified man was a minor donor. XII RP 1552-53. The DNA found on the shoelaces could have come from any cellular materials, including skin cells, sweat, or saliva. XII RP 1553. Because the tests are very sensitive, a person could leave detectible DNA on a shoelace merely by touching it. XII RP 1554.

No result could be obtained from the vaginal swab extract because the quantity of male DNA was too low. XII RP1534, 1559-60. The vaginal wash extract was tested by Orchid Cell Mart. XII RP 1535-36. Sione Lui could not be excluded as a donor of male DNA. XII RP 1537, 1566. 0.2% of the male population could have the same profile. XII RP 1546. Ms. Pineda was neither the analyst nor the supervisor for this test. XII RP 1564-65. She did not sign off on it. X RP 1562.

The report prepared by Orchid Cell Mart actually stated that Sione Lui could not be excluded as the "predominant" contributor of male DNA in the vaginal wash. XII RP 1566. Ms. Pineda acknowledged that other "peaks" were detected on some of the genetic markers that were inconsistent with Lui's profile. *Id.* Over additional objection, she was permitted to testify that she discussed that matter with analysts at the Dallas lab and they concluded that these other peaks were "below threshhold" and likely artifacts from the testing process rather than truly DNA from a second individual. XII RP 1567-68. She maintained that the word "predominant" went into the report "in order to be conservative." XII RP 1568.

In her closing argument, the prosecutor emphasized the Pineda's testimony was inconsistent with Lui's claim that he did not have sex with Boussiacos close to the time she disappeared.

> That is the second thing that he will never admit and has never admitted to any one, probably himself included, that is the intercourse that night. He has admantly denied throughout that they had sex.
>
> He loved the idea of religious righteousness, but he can't even admit to himself, even in the face of semen in her vagina, because whatever happened in that regard that night was very bad.

XVI RP 1828. The prosecutor then suggested that Lui might have sexually assaulted Boussiacos. XVI RP 1829. "Maybe it happened at the same time she was being strangled, maybe not." XVI RP 1830. *See also*, XVI RP 1853. The prosecutor explained the small amount of semen detected as follows: "It is entirely possible that there was no completed sex act and that would have been the final humiliation for him." XVI RP 1830.

The prosecutor urged the jury to accept Pineda's claim that "predominant contributor" of male DNA really meant "sole contributor." "We know that there is no other person's semen in her." XVI RP 1848.

C. THE TESTIMONY OF DR. HARRUFF AND MS. PINEDA VIOLATED THE CONFRONTATION CLAUSE

1 *Crawford* Established that the Confrontation Clause Bars the Admission of "Testimonial" Hearsay.

The Sixth Amendment provides that "[I]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..." U.S. Const. amend. VI. A "witness[]" is a person who gives testimony. Accordingly, in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court held that the prosecution may not introduce "testimonial hearsay against a criminal defendant absent a showing both that the declarant is unavailable and that the defendant had a prior opportunity for cross-examination. *Id.* at 54, 68.

The *Crawford* opinion and the Court's subsequent decision in *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Crawford*, 541 U.S. at 68, *see also Davis*, 547 U.S. at 822. Nonetheless, the Court has provided considerable guidance concerning the concept. As a starting point, the Court has noted that "testimony" is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S. at 51, (quoting 2 Noah Webster, American Dictionary of the English Language (1828)). The Court also has emphasized that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal

procedure" – particularly "its use of *ex parte* examinations" and "sworn *ex parte* affidavits" as substitutes for live testimony against the accused. *Id.* at 50, 52 n. 3; *see also Dowdell v. United States*, 221 U.S. 325, 330, 31 S. Ct. 590, 55 L.Ed. 753 (1911) (Confrontation Clause "intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits"); *Mattox v. United States*, 156 U.S. 237, 242, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (clause intended to prohibit use of "*ex parte* affidavits" in place of live testimony).

The Framers directed the Clause at the civil-law method of creating and presenting accusatory evidence for two main reasons. First, the prosecution's submission of written declarations deprives the accused of "an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox*, 156 U.S. at 242-43; *see also* 3 William Blackstone, Commentaries on the Laws of England *373-74 (1768) (same). Second, the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out of time and again throughout a

history with which the Framers were keenly familiar." *Crawford*, 541 U.S. at 56 n. 7. The Confrontation Clause "must be interpreted with this focus in mind." *Id.* at 50.

Applying these guiding principles, the Court held in *Crawford* that statements made by an individual to governmental officers during a stationhouse interrogation are testimonial. *Id.* at 51-52. The Court explained that police officers conducting interrogations perform "investigative functions" with an eye toward preparing cases for prosecution. *Id.* at 53. Consequently, allowing prosecutors to introduce records of such investigative statements instead of live testimony subject to cross-examination "presents the same risk[s]" of inaccuracy and distortion as the historical trial-by-affidavit abuses that the Framers decried. *Id.* at 53.

In *Davis,* the Court refined *Crawford*'s application to official interrogations, holding that statements made to governmental agents "are testimonial when the circumstances objectively indicate...that the primary purpose...is to establish or prove past events potentially relevant to alter criminal prosecution." *Davis*, 547 U.S. at 822. That being so, a person's statement to a police officer responding to the scene of a suspected crime was testimonial because she gave it as part of the officer's "investigation

into possibly criminal past conduct," and the statement "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." *Id.* at 829-30. "Such statements," the Court explained, "are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Id.* at 830 (emphasis in original). In other words, when "*ex parte* actors and the evidentiary products of the[ir] *ex parte* communication[s] align[] perfectly with their courtroom analogues," the communications are testimonial. *Id.* at 828.

By contrast, the Court also held in *Davis* that a person's cry for help to a 911 operator was not testimonial. Even though the caller's statements described criminal activity, the Court explained that the 911 operator elicited the statements "to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford)* what happened in the past." *Davis*, 547 U.S. at 827. Accordingly, the caller "simply was not acting as a witness...No 'witness' goes into court to proclaim an emergency and seek help." *Id.* at 828.

Whether a document might fit within an exception for business or public records is irrelevant to the constitutional issue presented here. The Supreme Court squarely held in *Crawford* that the Confrontation Clause is

a rule of criminal procedure that does not turn on "the vagaries of the rules of evidence." 541 U.S. at 61. Accordingly, the fact that a state has deemed a piece of evidence to be admissible under one of its hearsay exceptions does not determine whether it can be introduced against the accused in a criminal trial. *Id.* at 50-51.

To be sure, the Court noted in *Crawford* that certain hearsay exceptions encompass types of statements that "by their nature [a]re not testimonial." *Id.* at 56. And the exception for business records that existed at the time of the Founding was one such provision. The scope of that exception, however, was extremely limited. It permitted the introduction only of "shop-books"—that is, ledgers of "men of trades and handicraftsmen" recording wares shipped, sold, and received. 5 John H. Wigmore, Wigmore on Evidence §§ 1517-18, at 347 (3d ed. 1940) (quotation marks omitted); *see also Radtke v. Taylor*, 105 Or. 559, 210 P. 863 (Or. 1922) (detailing history of shop-book rule).

The common-law shop-book exception for regularly kept business records did not remotely encompass reports generated for use in investigations or litigation. Indeed, as late as the mid-twentieth century the Court declined to expand the federal hearsay exception for business records to cover a railroad's accident report that it purportedly created in

the regular course of business. *See Palmer v. Hoffman*, 318 U.S. 109, 113-15, 63 S.Ct. 477, 87 L.Ed. 645 (1943). The Court explained that the business-record rule applied only to "the management or operation" of businesses. *Id.* at 113. Extending the rule to cover records "calculated for use essentially in the court" or created during the "[p]reparation of cases for trial" would "completely empty the words of the [business-records rule] of their historic meaning." *Id.* at 113-14; *see also State v. Simbara*, 175 N.J. 37, 811 A.2d 448, 455 (N.J. 2002) ("A laboratory certificate in a drug case is not of the same ilk as other business records, such as an ordinary account ledger or office memorandum in a corporate-fraud case.").

Nor did the common-law hearsay exception for official (or public) records—to the extent it even existed at the time of the Founding—cover reports produced in anticipation of litigation. Rather, the exception developed to allow the introduction of "[o]fficial registers, or books kept by persons in public office, in which they are required to write down particular transactions, or to enroll or record particular contracts or instruments." *Ferguson v. Clifford*, 37 N.H. 86, 95 (1858). Even today, the Federal Rules of Evidence expressly prohibit using the "public records" hearsay exception in criminal cases to introduce reports recording "matters

observed by police officers and other law enforcement personnel" or "factual findings resulting from an investigation made pursuant to authority granted by law." Fed. R. Evid. 803(8)(B) & (C). The Rule's drafters codified these prohibitions while otherwise expanding the reach of the Rule in order to avoid "the almost certain collision with confrontation rights which would result from [such records'] use against the accused in a criminal case." Advisory Committee's Notes, Note to Paragraph (8) of Rule 803, 56 F.R.D. 313 (1972); *see also Kirby v. United States*, 174 U.S. 47, 60-61, 19 S.Ct. 574, 43 L.Ed. 890 (1899) (official record of co-conspirator's guilty plea not admissible in place of co-conspirator's live testimony); *United States v. Oates*, 560 F.2d 45, 63-84 (2d Cir. 1977) (chemist report prepared for prosecution cannot be characterized as "public record"); *Cole v. State*, 839 S.W.2d 798, 801-06 (Tex. Crim. App. 1990) (same).

It makes no difference that, prior to *Crawford*, some Washington cases expanded the definition of business or official records to encompass forensic laboratory or medical reports. No matter how classified under state hearsay law, sworn statements that law enforcement officers gather "to establish or prove past events potentially relevant to later criminal prosecution" are testimonial. *Davis*, 547 U.S. at 822. And as the Court

emphasized in *Crawford*, the reasons for subjecting testimonial statements to confrontation procedures "do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." 541 U.S. at 56 n.7. Accordingly, jurisdictions may no more insulate forensic reports from the adversarial process by labeling them business or official records than they could by giving the same label to transcripts of custodial interrogations, which, after all, police conduct as public officials in their ordinary course of business. *See State v. Johnson*, 982 So.2d 672, 677-78, 33 Fla. Weekly S265 (Fla. 2008). "[E]x parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." *Crawford*, 541 U.S. at 51.

In the Superior Court, the prosecutor argued that an autopsy report was not testimonial because medical examiners have an official duty to conduct autopsies. But this is nothing more than a reliability-based argument, which *Crawford* flatly precludes. In any event, police officers also have an official duty to conduct their investigations dispassionately and to report their findings accurately. *See, e.g. Luna v. Massachusetts*, 354 F.3d 108, 109-110 (1st Cir. 2004). Likewise, magistrates taking examinations under the Marian statutes acted under official duty of law,

yet the admission of their reports was a "principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50. In the founding era, coroners' reports were not offered as "a source of evidence" against the accused at all. Wigmore, John Henry, A Treatise on the Anglo-American System of Evidence in Trials at Common Law (2d ed. 1923), at 516. As Wigmore's treatise explains, such reports, "so far as criminal proceedings [were] concerned, [were] 'in the nature of indictments.'" *Id.* (quoting Edward Hyde East, I Pleas of the Crown 389 (1803)); *see also Smalls v. State*, 40 L.R.A. 369, 101 Ga. 570, 28 S.E. 981, 982 (Ga. 1897) ("At common law the verdict of a coroner's jury was, when it contained the subject-matter of an accusation, equivalent to an indictment of the accused for the homicide of the deceased."); William L. Clark, Criminal Procedure § 50, at 130 (1895) ("[T]he finding of the coroner's jury is itself equivalent to the finding of a grand jury."). "[T]herefore," it was "superfluous . . . to offer [coroners' reports] against the accused on trial; they [were] the foundation of the charge against him." Wigmore, supra, § 1671(6), at 516 (footnote omitted). "The general rule" well into the twentieth century was that "in a prosecution for homicide the finding of a coroner or the verdict of a coroner's jury as to the manner and cause of the death of the deceased [was] inadmissible in evidence for any purpose."

Sandel v. State, 119 S.E. 776 (S.C. 1922) (quoting 4 Ann. Cas. 1020 (William M. McKinney et al. eds., 1907) (collecting cases)); *see also* B.W., Official Records. Coroner's Inquest, 65 U. Penn L. Rev. 290 (1917) ("In homicide cases the verdict of the coroner is clearly inadmissible in every state in the Union except Louisiana.").

2. Many Courts Have Applied *Crawford's* Principles to Forensic Reports

Even before its decision in *Crawford*, the Supreme Court assumed on three separate occasions that the Sixth Amendment's Confrontation Clause requires the prosecution, absent a stipulation from a defendant, to present the findings of its forensic examiners through live testimony at trial. *See California v. Trombetta*, 467 U.S. 479, 490, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) ("[T]he defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the fact-finder whether the test was properly administered."); *United States v. Wade*, 388 U.S. 218, 227-28, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (When the government performs "scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like[,] . . . the accused has the opportunity for a meaningful confrontation of the Government's case at trial."); *Diaz v. United States*,

223 U.S. 442, 450, 32 S.Ct. 250, 56 L.Ed. 500 (1912) (Certain pretrial "testimony" including an autopsy report "could not have been admitted without the consent of the accused . . . because the accused was entitled to meet the witnesses [who prepared the report] face to face."). A straightforward application of *Crawford's* now-controlling "testimonial" framework confirms the correctness of this Court's prior assumptions.

Many state courts have found that, in view of *Crawford*, forensic reports prepared in contemplation of prosecution are testimonial. *See State v. Johnson*, 982 So. 2d 672 (Fla., 2008) (laboratory report identifying presence of illegal drug); *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007) (same); *State v. March*, 216 S.W.3d 663 (Mo.) (same), *cert. dismissed*, 128 S. Ct. 1441 (2007); *Thomas v. United States*, 914 A.2d 1 (D.C. 2006) (same), *cert. denied*, 128 S. Ct. 241 (2007); *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) (same); *State v. Campbell*, 719 N.W.2d 374, 376 (N.D. 2006) (assuming same), *cert. denied*, 127 S. Ct. 1150 (2007); *State v. Laturner*, 163 P.3d 367 (Kan. Ct. App. 2007) (report certifying presence of illegal drug); *State v. Miller*, 144 P.3d 1052 (Or. Ct. App.) (same), *opinion adhered to on reconsideration*, 149 P.3d 1251 (Or. Ct. App. 2006); *United States v. Rahamin*, 168 Fed.Appx. 512, 520 (3d Cir. 2006) (recognizing that a DEA laboratory report appeared to be a

testimonial statement since it was offered to prove the weight and substance of ecstasy pills); *City of Las Vegas v. Walsh*, 121 Nev. 899, 124 P.3d 203, 207-08 (2005) (deciding under *Crawford* that nurse's affidavit describing procedure used to draw blood was testimonial), *cert. denied*, 547 U.S. 1071, 126 S.Ct. 1786, 164 L.Ed.2d 519 (2006); *People v. Rogers*, 8 A.D.3d 888, 780 N.Y.S.2d 393, 396-97 (2004) (deciding under *Crawford* that admission of blood test results violated Confrontation Clause).

To be sure, some other states have come to a contrary conclusion. In this case, the trial court relied on *Ohio v. Crager*, 116 Ohio State 3d 369, 879 N.E.2d 745 (2007) (cert. pending) ; *North Carolina v. Delaney*, 171 N.C. 141, 613 E.2d 699 (2005); and *California v. Geier*, 41 Cal. 4th 55, 161 P.3d 104 (2007) (cert. pending). *See* XII RP 1478-80. The United States Supreme Court, however, has chosen to take review of a case finding a forensic report to be non-testimonial. *Melendez-Diaz v. Massachusetts*, -- U.S.-- , 128 S.Ct. 1647, 170 L.Ed.2d 352 (2008). It is likely to reverse the decision of the Massachusetts court.

3. Several Courts Have Concluded that the Confrontation Clause is Violated Even When the Government Presents an Expert Witness to Testify Based on the Work of Others.

As discussed above, the trial court in this case believed that any confrontation problem was cured once the State presented an expert witness who could be cross-examined, even if that witness relied on the work of others. Several courts have disagreed with such reasoning.

In *New York v. Goldstein*, 6 N.Y.3d 119, 843 N.E.2d 727, 810 N.Y.S.2d 100 (2005), *cert. denied*, 547 U.S. 1159, 126 S.Ct. 2293, 164 L.Ed.2d 834 (2006), a psychiatrist testified that the defendant was not insane at the time of the crime. *Id.* at 122. She based her opinion in part on interviews with third parties who had contact with the defendant. *Id.* at 123. The prosecution argued that it was not presenting hearsay because the third-party statements were not offered for the truth of the matter asserted but merely to help the jury evaluate the psychiatrist's opinion. *Id.* at 127. The Court rejected that argument. "We find the distinction the People make unconvincing. We do not see how the jury could use the statements of the interviewees to evaluate [the psychiatrist's] opinion without accepting as a premise either that the statements were true or that they were false." *Id.* at 127, citing *Kaye, et al., The New Wigmore: Expert Evidence* § 3.7, at 19 (Supp. 2005) ("The factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the

evaluation of the experts' conclusions but not for its truth ought not to permit an end-run around a constitutional prohibition.")

Similarly, in *Smith v. Alabama*, 898 So.2d 907 (2004), the testimony of a medical examiner violated the Confrontation Clause because it was based in part on the work of a pathologist who actually performed the autopsy.

In *Roberts v. United States*, 916 A.2d 922 (D.C. 2007), a DNA expert gave an opinion about the probabilities of a match although he was not one of the scientists who did the original analysis. *Id.* at 937. As in this case, the testifying expert reviewed the data himself and came to his own opinion. *Id.* at 937-38. The D.C. Court had previously held in *Thomas v. United States*, 914 A.2d 1 (D.C. 2006), *cert. denied*, 128 S.Ct. 241, 169 L.Ed.2d 160 (2007), that the conclusions of FBI laboratory scientists, including the serologist, the PCR/STR technician, and the examiner are testimonial under *Crawford* when they are admitted as substantive evidence at trial.

The Government argued in *Roberts*, however, that a testifying expert should nevertheless be permitted to rely on such information as part of the basis of his opinion, as Fed. R. Evid. 703 permits. *Id.* at 938-39. The *Roberts* Court rejected that argument, in part because the jury was

given no limiting instruction and therefore did consider the underlying information as substantive evidence. *Id.* at 939. The same reasoning would apply in this case because the jury heard considerable testimony about the underlying data and opinions relied on by Dr. Harruff and Ms. Pineda, and was never told that such information could not be considered for the truth of the matter asserted. The *Roberts* Court did not formally decide what the result would be if the work of the other scientists were used solely as a basis for this expert's opinion, but did cite *Goldstein* with approval on that point.

In *State v. Johnson*, 982 So.2d 672 (Fla., 2008), the Florida Supreme Court found a Confrontation violation when a laboratory supervisor was permitted to testify about the results of a drug test performed by a subordinate. Presumably, the supervisor could have been cross-examined in the same manner that Ms. Pineda could have been cross-examined about the work of her subordinates. *See also*, *People v. Lonsby*, 268 Mich. App. 375, 707 N.W.2d 610 (2005) (crime laboratory serologist's testimony that stain on bathing suit was semen violated *Crawford* because it was based on work of another serologist from same laboratory).

4. The Trial Court's Analysis of Washington Law was Faulty.

In admitting Dr. Harruff's testimony, the trial court relied on *State v. Garrett*, 76 Wn. App. 719, 887 P.2d 488 (1995) (doctor could testify based on medical records generated by others); *State v. Heggins*, 55 Wn. App. 591, 779 P.2d 285 (1989) (autopsy report is a business record), *State v. Kreck*, 86 Wn.2d 112, 542 P.2d 782 (1975) (documents admitted under the business records exception do not violate the Confrontation Clause). XII RP 1477-78; CP 17-18.

In admitting the testimony of Ms. Pineda, the Court recognized that there was no Washington case directly on point, but relied on *State v. Kronich*, 160 Wn. 2d 893, 161 P.3d 982 (2007) (DOL certification describing status of defendant's license is not testimonial). XII RP 1478-80. The Court noted that a Division III case, *State v. Hopkins*, 134 Wn. App. 780, 142 P.3d 1104 (2006), *rev. denied*, 160 Wn.2d 1020, 163 P.3d 793 (2007), supported the defense, but did not believe that Division I or the Washington Supreme Court would follow it. XII RP 1480, 1532.

The trial court should not have relied on *Garrett*, *Kreck* and *Heggins* because they are no longer valid in view of *Crawford*. In *Kreck*, 86 Wn.2d at 113-120, the Washington Supreme Court found that a toxicology report fell within the hearsay exception for business records, and was sufficiently "reliable" to satisfy the Confrontation Clause. In

Heggins, 55 Wn. App. at 596-97, this Court relied on *Kreck* to hold that a medical examiner could testify in reliance on an autopsy report prepared by another. Again the focus was on the "reliability" of the hearsay. *Id.* In *Garrett*, the Court found the medical records underlying the expert's opinion to be admissible under the business records exception, again emphasizing that they were "reliable." *Id.*, 76 Wn. App. at 725. As discussed above in section IV(C)(1), autopsy reports and forensic analyses are "testimonial," whether or not they meet a state's definition of business records. Further, "reliability" is simply irrelevant to the current Confrontation analysis.[1]

Similarly, the trial court's finding that the State met the foundational requirements for expert testimony set out in *State v. Ecklund*, 30 Wn. App. 313, 633 P.2d 933 (1981) and *State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (2002), has no bearing on the constitutional issue. Neither of those cases applied a *Crawford* analysis.

The trial court had no authority to reject Division III's decision in *State v. Hopkins*, *supra*, absent any contrary authority from this Division. In *Hopkins*, the Court of Appeals recognized that the Confrontation Clause

---

[1] In any event, forensic reports are not necessarily reliable. *See State v. Roche*, 114 Wn. App. 424, 59 P.3d 682 (2002).

prohibits one medical expert from testifying in place of another. In that case, the child victim of sexual abuse made various statements to an examining nurse practitioner. Her supervising doctor then testified at trial, relying on the nurse's report. *Hopkins*, 134 Wn. App. at 784. The Court accepted that the victim's statements to the nurse fit within the hearsay exception of ER 803(a)(4) (statements for the purpose of medical diagnosis), and the nurse's report could fit within the exception for under RCW 5.45.020 (business records) if the proper foundation were laid. *Id.* at 788-89. Nevertheless, the doctor's testimony violated the Confrontation Clause. *Hopkins*, 134 Wn. App. at 790-91. The nurse's report was "testimonial" because she would have understood that it would be available for use at a later trial. *Id.*, citing *Crawford*, 541 U.S. at 51-52. The same reasoning applies in this case to the testimony of Dr. Harruff and Ms. Pineda.

State v. Kronich, *supra.*, is not to the contrary. The issue in that case was whether a DOL certification describing the status of defendant's driving privileges is testimonial. The Washington Supreme Court found it was not because DOL maintains driving records as part of its licensing duties. Although the records may prove useful in some criminal prosecutions, they are not generated for that purpose. *Kronich*, 160 Wn.

2d at 902-05. By contrast, an autopsy report in a homicide case invariably deals with evidence relevant to the murder prosecution because it relates to the time and cause of death. As the medical examiners are well aware, the State will present their findings when the case goes to trial. The reports and statements of the DNA experts in this case were likewise testimonial because they were generated at the request of the prosecution, for the obvious purpose of obtaining evidence that could be used at trial.

V.
CONCLUSION

Thus, the for the foregoing reasons, the testimony of Dr. Harruff and Ms. Pineda violated Lui's Sixth Amendment right to confrontation. The State cannot show that the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). As discussed above in section IV(A) the medical testimony was used to show that the time and manner of death were consistent with Lui committing the crime. As discussed in section IV(B), the DNA testimony was used as circumstantial evidence that Lui was the one who dressed Boussiacos after her death, and that he showed conciousness of guilt by falsely denying sexual intercourse with her. Any

other evidence against Lui was weak and circumstantial, as shown by the six-year delay in charging.

The Court should therefore reverse and remand for a new trial.

DATED this 26th day of February, 2009.

Respectfully submitted,

David B. Zuckerman, WSBA #18221
Attorney for Sione P. Lui

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of this brief on the following:

Appellate Unit
King County Prosecutor's Office
516 Third Avenue, W554
Seattle, WA 98104

Mr. Sione Lui#319129
Washington Corrections Center
PO Box 900
Shelton, WA 98584

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 FEB 27 AM 11:07

2/26/2009
Date

Emily Knudsen